

CASE NOS. PD-0695-20, PD-0696-20, PD-0697-20

In The
COURT OF CRIMINAL APPEALS
OF
THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DAVID EARL SPILLMAN, Appellant

VS.

THE STATE OF TEXAS, Appellee

On Petition for Discretionary Review from the
5th District Court of Appeals at Dallas, Texas
Appellate Cause Nos. 05-19-00530, 05-19-00531, 05-19-00532

STATE'S BRIEF

NOBLE DAN WALKER, JR.
District Attorney, in and for
Hunt County, Texas

STEVE LILLEY
1st Assistant District Attorney
State Bar Number - 24046293
P.O. Box 441
4th Floor, Hunt County Courthouse
Greenville, Texas 75401
Telephone Number - (903) 408-4180
Facsimile Number - (903) 408-4296
Email: slilley@huntcounty.net

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The question of how much and what kind of evidence is required to prove the offense of Assault on a Public Servant is an important one statewide. Whether evidence amounts to reckless conduct has been the subject of numerous opinions in the courts of appeals and by this Court in the last several decades. Due to the confluence of these important issues in this case, the State requests oral argument.

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SUMMARY OF THE STATE'S ARGUMENT

This Court granted review to analyze whether Petitioner's convictions for Assault of a Public Servant were supported by legally sufficient evidence.

A person can commit assault on a public servant intentionally, knowingly or recklessly. Conduct is reckless when the actor can foresee an unreasonable risk his conduct creates but he engages in the conduct anyway, thus causing the complained of injury or result. Recklessness must be judged not by the end result, but by risk inherent in the conduct itself.

Officer Steven Carper was conducting a brief narcotics investigation when he asked Petitioner to remove his shoes. Petitioner did so, but in a suspicious way and Carper responded by grabbing Petitioner's wrist to gain compliance. Petitioner tensed up and forcefully jerked and pulled away from Carper and Officer Kendall Reeves. The ensuing scuffle was over quickly, but resulted in injuries to both Carper and Reeves.

Based upon this Court's case law on recklessness and lower court cases reviewing legal sufficiency in assault on a public servant cases, Petitioner's conduct makes him criminally responsible for the injuries to Carper and Reeves. Petitioner was aware of the risks his actions created both to himself and the officers. The resulting injuries were foreseeable under the circumstances and Petitioner caused them by his actions. Therefore, the evidence introduced at trial was legally sufficient to support his convictions for assault on a public servant.

ARGUMENT

Introduction

The question before the Court in this appeal is whether the evidence introduced at trial was legally sufficient to support Petitioner's two convictions for Assault on a Public Servant. The answer is yes.

On the evening of August 12, 2016, Officer Steven Carper of the Greenville Police Department initiated a traffic stop on Petitioner. Carper smelled what he believed to be marijuana emanating from inside Petitioner's vehicle. Officer Kendall Reeves arrived to provide assistance as Carper performed a search of Petitioner's vehicle. After completing the vehicle search, Carper asked Petitioner to remove his shoes as Carper's experience informed him persons in possession of narcotics will occasionally hide it in their shoes to avoid discovery during a search. Upon witnessing Petitioner remove one shoe in an unusual way, Carper reached out and grabbed Petitioner's balled up hand as Carper believed Petitioner may have removed something from inside the shoe. A scuffle quickly ensued between Petitioner and Officers Carper and Reeves. Though it lasted only seconds, the incident resulted in injuries to both officers as well as the discovery of a controlled substance in Petitioner's possession.

The Hunt County Grand Jury indicted Petitioner on two charges of Assault on a Public Servant, which are the subject of this appeal, and the offense of Possession of a Controlled Substance over 4 grams but less than 200 grams.

Petitioner's was tried and convicted on all three indictments. The jury issued matching fifty year sentences on Petitioner for the Assault on a Public Servant charges and a sixty year sentence on the controlled substance charge.

Petitioner appealed his convictions alleging there was legally insufficient evidence to sustain his convictions for Assault on a Public Servant and that the trial court erred in refusing to include an exclusionary instruction in the court's charge on the controlled substance case. The 5th Court of Appeals disagreed and affirmed all three convictions in an unpublished opinion filed July 16, 2020.

Understandably unhappy with the results of the trial and first appeal, Petitioner filed a *pro se* Petition for Discretionary Review on all three convictions with this Court on October 22, 2020. This Court granted the Petition, but only on the issue whether legally sufficient evidence supported the two convictions for Assault on a Public Servant.

Petitioner's convictions for Assault on a Public Servant were supported by legally sufficient evidence he committed the offenses at least recklessly. In affirming both convictions, the 5th Court of Appeals did not deviate, but rather followed this Court's guidance on the issue of recklessness as well as opinions in sister courts with similar fact patterns. This Court should likewise affirm both convictions.

I.
THE SCUFFLE

The testimony of Officers Carper and Reeves, along with in car dash-cam footage, form the bulk of the evidence supporting Petitioner's convictions. In the light most favorable to the verdict, the facts are these:

On August 12, 2016, Officer Steven Carper stopped a moving vehicle which had been parked illegally moments before. He recognized the driver and sole occupant as Petitioner, David Spillman, Jr. Reporter's Record (RR) Vol. 8 p. 35. At the time, Carper had been on patrol for only four months, but had interacted with Petitioner more than once, though Carper had not previously arrested him. Id., Id. at 69-70.

After searching Petitioner's vehicle for contraband, Carper asked Petitioner to remove his shoes. Petitioner began to take one shoe off in an odd way which made Carper suspect Petitioner was attempting to hide something. Id. at 49. Officer Carper reached out and grabbed Petitioner's wrist in an effort to keep Petitioner from concealing any items he had removed from inside the shoe. Rather than complying with Carper's minimal use of force, Petitioner tensed up. Id. Carper then reached out with his other hand and grabbed Petitioner's forearm in an effort to gain compliance. Id. Petitioner resisted by trying to pull and jerk away from Carper while raising his arm up in the air to keep his hand

away from Carper. Id. at 52. Petitioner simultaneously reached out and grabbed Carper with his free hand. Id.

Carper testified Petitioner's efforts in pulling away from both he and Officer Reeves resulted in all three of them twisting around and heading toward the ground. Id. at 83. Carper planted with one leg in an effort to brace himself. Unfortunately, when he did so, Carper heard a pop in his knee and felt a grinding sensation. Id. at 53.

Carper described much of the altercation while physically re-enacting parts of it for the jury. As is want to happen, the written words of the trial transcript do always capture exactly what Carper was showing the jury through the demonstration. However, the record shows Carper recalled his knee injury occurring just before Officer Reeves gained some measure of control over Petitioner as all three were headed to the ground. Id.

Officer Reeves testified he also saw Petitioner grab at Officer Carper as Petitioner tried to keep the other hand away from both officers. Id. at 120. Petitioner was taller than Reeves, so Reeves utilized a technique called a hip throw to gain leverage against Petitioner. Id. at 121. All three men fell to the ground and Reeves struck his elbow on the street pavement causing it to bleed. Id.

The in car video footage, introduced as State's Exhibit 2, shows the beginning of the altercation. All three men are still on their feet as they move off

camera to the left of the screen. Though the video does not show the moment of injury to either officer, it does emphasize how quickly the incident happened, lasting as little as ten seconds.

Those moments, however, had a significant impact on Officer Carper in the ensuing months. Carper testified he began to feel pain in the knee shortly after the altercation. Id. at 56. An MRI showed Carper had suffered a torn ACL ligament. After a month, he had surgery to completely replace the ligament followed by four and half months of rehabilitation. Id. at 57.

II.

THE LAW

A.

Legal Sufficiency Generally and with Reckless Conduct Specifically

To determine whether the State produced legally sufficient evidence to support a conviction, appellate courts must review all of the evidence, and inferences from the evidence, in a light most favorable to the verdict to determine whether a rational juror could find all of the elements of the crime beyond a reasonable doubt. Isassi v. State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Whether evidence is circumstantial or direct, the same deference applies. Jurors may draw reasonable inferences from the facts and if conflicting inferences are

possible, the reviewing court must presume the conflict was resolved in favor of the verdict. Temple v. State, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013).

From the trial through the first appeal and up to now, these two cases hinge on one, perhaps two, questions. Did the State produce legally sufficient evidence the Petitioner's conduct was reckless; and relatedly, did Petitioner's conduct "cause" the bodily injuries to Officers Reeves and Carper?

A person commits Assault on a Public Servant when he intentionally, knowingly or recklessly causes bodily injury to a person the actor knows is a public servant while the public servant is lawfully discharging an official duty. Tex. Penal Code §22.01. Petitioner's indictments allege all three *mens rea* in the disjunctive. The court's charge in each case similarly authorized conviction if the jury believed Petitioner intentionally, knowingly or recklessly caused bodily injury to Officer Carper and Officer Reeves respectively. However, during the trial, and particularly during closing arguments, the State focused its attention on showing Petitioner committed the offenses recklessly.

Reckless culpability is defined in the Texas Penal Code. "A person acts recklessly, or is reckless, with respect to ... the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the ... result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person

would exercise under all the circumstances as viewed from the actor's standpoint." Tex. Pen. Code. §6.03(c).

In 2007, this Court sought to clarify several aspects of the reckless *mens rea* in Williams v. State, 235 S.W.3d 742 (Tex. Crim. App. 2007). The Court stated a defendant is reckless when he foresees the unjustifiable and substantial risk his conduct will create, but he nonetheless engages in the conduct anyway. Id. at 752-53. However, whether the risk was particularly "unjustifiable and substantial" is determined by the conduct itself, not by the actual harm done. Id. In other words, recklessness is not, "This conduct was reckless, look at what happened!" Instead, recklessness is, "This conduct was reckless, he could clearly see might happen!"

Foreseeability is related to the issue of causation. In our Penal Code, conduct "causes" a result if the result would not have happened but for the conduct. Tex. Penal Code §6.04. This is true even if other acts or circumstances acted in conjunction with the conduct to ultimately cause the result, unless "the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." Id.

When it comes to bodily injury, does a defendant have to foresee the risk of a specific injury by his conduct in order to be responsible for it? The law says "No." A defendant need only foresee the class or type of result or injury as defined by statute to be responsible for it. See, e.g. Kolb v. State, 523 S.W.3d 211,

216 (Tex. App.-Houston [14th Dist.] 2017, pet. ref'd), Dolkart v. State, 197 S.W.3d 887, 893 (Tex. App.-Dallas 2006, pet. ref'd).

Petitioner argued on appeal he was not responsible for Carper's or Reeves's injuries because he could not have foreseen Carper's knee ligament tearing or that Reeves would suffer a bloody elbow. The court below rightfully rejected this argument. "[K]nowledge and disregard of a specific kind of risk to a specific person is not required. It is enough that the actor was aware of and disregarded a risk of injury to a general class of probable victims." Spillman, 2020 WL 4013142 *3, *citing* In re K.W.G., 953 S.W.2d 483, 487 (Tex. App. – Texarkana 1997, pet. denied).

With the number of ways a person can be injured, the State must not be required to prove a defendant foresaw his conduct could result in the particular type of injury happening in a specific way or to a specific person. Only that his conduct could cause the type or class of injury which resulted.

B.

Legal Sufficiency in Reckless Assault on a Public Servant cases

Law enforcement and the public interact hundreds or thousands of times each day. Normally, the result is a routine warning, citation or arrest. Rarely, a person will resist officers as they attempt to arrest or detain him. Thankfully, even less frequently, the suspect's conduct either directly or indirectly results in

injury to officers. When is a defendant criminally responsible for those injuries even if he “didn’t mean for it to happen?” The appellate courts and this Court have weighed in on this question on numerous occasions.

Most obviously, when a person strikes at an officer directly in an attempt to escape or resist, he is responsible for recklessly causing the officer’s resultant injury. Lofton v. State, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001), Steele v. State, 490 S.W.3d 117, 130 (Tex. App.-Houston [1st Dist.] 2016, no pet.). The same is true when a suspect’s kicks or flailings are not directed at officers, but he hits an officer anyway causing injury. “This evidence showed that Gumpert recklessly caused bodily injury in disregarding the substantial nonjustifiable risk that his struggling, flailing about, and kicking could result in bodily injury to [the victim] and that bodily injury in fact resulted.” Gumpert v. State, 48 S.W.3d 450, 454 (Tex. App.-Waco 2001, no pet).

What about when a suspect resists an officer’s demands by generally “struggling” with him but he doesn’t strike the officer with his hands or feet? There are at least two published opinions with this basic fact pattern. Both were delivered after this Court decided Williams and in both cases, this Court refused a Petition for Discretionary Review. In Morales v. State, the Sixth Court held legally sufficient evidence supported a conviction for reckless assault on a peace officer when the defendant charged at the officer causing the officer to hit the ground and pepper spray from a fellow officer to get into the officer’s eyes.

Morales, 293 S.W.3d 901, 909-10 (Tex. App.-Texarkana 2009, pet. ref'd). In Griffs v. State, the court held evidence supported the defendant's conviction when a struggle between the defendant and an officer caused the two to fall to the ground and the officer suffered scratches to his arms and legs. Griffs, 441 S.W.3d 599 (Tex. App.-San Antonio 2014, pet. ref'd).

Both courts observed that when a defendant resists his arrest in any way, he may be criminally responsible for the resulting injuries to officers. “[W]hether Griffis’s actions were a result of his resisting, as opposed to a violent attack on the officers, is also irrelevant.” Id. at 604-05. “Pulling away from an officer’s grasp, or passively refusing to cooperate in an arrest, if pain results to the arresting officer, theoretically could support an assault conviction.” Morales, 293 S.W.3d at 908.

Perhaps the general rule, if one exists, is not as broad as the court in Morales suggests. However, the case law shows courts will generally uphold convictions for reckless assault on a peace officer where the defendant used any amount of physical force to obstruct or resist an officer’s lawful actions and an officer involved is injured in the ensuing altercation.

This rule, if this Court wishes to classify it as one, is sensible. It accounts for the real world conditions and risks inherent when a suspect decides to strike out or resist officers asserting their lawful authority. However, the rule also provides reasonable limits to a person’s criminal responsibility for their reckless

behavior towards law enforcement. First, the type of injury being discussed is bodily injury only. The defendants in these cases, and in Petitioner's, are not being held responsible for foreseeing serious bodily injury when they use non-lethal force to resist or obstruct officers. Second, the defendant is only being held responsible for foreseeing the risk of bodily injury to officers who were present at the time he acted, not other officer who appear only later to assist.

As the State said in closing argument, officers do not consent to bodily injury when they arrive for work each day. Though difficult and challenging conditions are common, officers must be as protected as the general public from reckless conduct. A defendant who decides to strike out at officers or resist their lawful authority is being reckless. He is choosing to act despite the clear risk his conduct presents to himself and the officers around him attempting to perform their duties. With these legal and policy considerations in mind, the State now turns to Petitioner's case to show how his conduct and the injurious results measure up against this legal sufficiency framework.

IV.

APPLICATION OF THE LAW TO THE FACTS

During his encounter with Petitioner, Officer Carper took several lawful steps to investigate his suspicion Petitioner was in possession of a controlled

substance. Upon smelling the distinct odor of marijuana, he performed a lawful probable cause search of Petitioner's vehicle. After completing this search, he asked Petitioner to remove his shoes, a request Petitioner has never argued was unreasonable or unlawful. When Petitioner withdrew his hand from his shoe, Carper lawfully responded by using a minimal amount of force to get Petitioner to open his hand and show its contents.

Petitioner responded by first tensing up and then quickly jerking and pulling away from both Carper and Officer Reeves. Petitioner has never argued he was justified in doing so. In fact, his request to add the lesser included offense of resisting arrest to the jury charge indicates the opposite. Additionally, Petitioner does not claim the officers' resulting attempt to take him to the ground was improper.

Though Carper's injuries were especially significant, Petitioner was charged with causing only bodily injury to Carper and Reeves. Finally, Petitioner was charged with assaulting only the two officers directly dealing with him. Carper and Reeves were both within an arm's length of Petitioner as he started resisting their lawful authority. Petitioner can therefore not claim he could not foresee the risk to each of them as he chose to resist with force.

According to the assault statute, the statutory definition of "reckless," and the case law interpreting these provisions, Petitioner's acts make him criminally responsible for the injuries he caused. His conduct risked bodily injury to the

officers in his presence and actually caused this same type of foreseeable injury to Officers Carper and Reeves.

Petitioner was not convicted of any more serious injury than he could foresee given his conduct, nor was he convicted of injuring any person he did not know could be impacted by his conduct. He was convicted only for what he did, what he risked, and the foreseeable results he caused. Therefore, this Court should hold there is legally sufficient evidence to support Petitioner's convictions for Assault on a Public Servant against both Officers Carper and Reeves.

CONCLUSION

Appellant's convictions are supported by legally sufficient evidence. The decision of the 5th Court of Appeals was therefore without error and should be affirmed.

PRAYER

The State prays that Appellant's conviction and sentence be in all things affirmed.

Respectfully submitted,

NOBLE D. WALKER, JR.

District Attorney
Hunt County,
Texas

By:

/s/ Steven Lilley

STEVEN LILLEY

Assistant District Attorney
P.O. Box 441
4th Floor Hunt County Courthouse
Greenville, TX 75403
State Bar No. 24046293
(903) 408-4180
FAX (903) 408-4296

CERTIFICATE OF SERVICE

A true copy of the State's brief has been served upon, Mark Bennett,
Attorney for Petitioner, on April 15, 2021.

/s/ Steven Lilley
STEVEN LILLEY
Assistant District Attorney

CERTIFICATE OF COMPLIANCE AND WORD COUNT

In accordance with Texas Rules of Appellate Procedure 9.4 (e) and (i),
the undersigned attorney of record certifies that Appellee's Brief contains Arial
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/s/ Steven Lilley
Steven Lilley
Assistant District Attorney
P. O. Box 441
4th Floor Hunt County
Courthouse Greenville, TX
75403
(903) 408-4180
FAX (903) 408-4296
State Bar No. 24046293

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Steven Lilley on behalf of Steven Lilley
Bar No. 24046293
slilley@huntcounty.net
Envelope ID: 52510597
Status as of 4/16/2021 8:08 AM CST

Associated Case Party: David Spillman

Name	BarNumber	Email	TimestampSubmitted	Status
Mark W. Bennett	792970	eservice@ivi3.com	4/15/2021 3:59:34 PM	SENT
Lane Haygood	24066670	efile@haygoodlawfirm.com	4/15/2021 3:59:34 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	4/15/2021 3:59:34 PM	SENT
Steven Lilley		slilley@huntcounty.net	4/15/2021 3:59:34 PM	SENT